STATE OF MICHIGAN

COURT OF APPEALS

MYRA WALKER, Plaintiff-Appellant,	UNPUBLISHED March 1, 2011
v	No. 293626 Macomb Circuit Court
MARY A. KILPATRICK, Defendant-Appellee.	LC No. 2008-002722-NO

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition on the basis of the open and obvious danger doctrine. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff first argues that the trial court erred in granting defendant's summary disposition motion under MCR 2.116(C)(10) and dismissing her claim on the basis of the open and obvious danger doctrine. Plaintiff argues that a reasonable person would have been unable to see the black ice that had formed on defendant's driveway upon casual inspection. We disagree.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), a reviewing court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A landowner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a premises possessor is not generally required to protect an invitee from open and obvious dangers, unless "special aspects" of a condition make even an open and obvious risk unreasonably dangerous, in which case the possessor must take reasonable steps to protect invitees from harm. *Id*. Special aspects exist only when the conditions give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided. *Id.* at 518-519.

The question of whether a condition is "open and obvious" depends on whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The test is objective; thus, "the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger . . . ." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). When deciding a summary disposition motion based on the open and obvious danger doctrine, "it is important for courts . . . to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo*, 464 Mich at 523-524. If genuine issues of material fact exist regarding the condition of the premises and whether the hazard was open and obvious, summary disposition is inappropriate. See *Bragan v Symanzik*, 263 Mich App 324, 327-328; 687 NW2d 881 (2004).

Michigan courts have applied the open and obvious danger doctrine to conditions involving the natural accumulation of ice and snow, holding that knowledge regarding the existence of a condition "should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." *Slaughter*, 281 Mich App at 479. However, the courts have declined to extend the open and obvious doctrine to "black ice," which is, by its nature, invisible or nearly invisible, without evidence that the black ice in question would have been visible on casual inspection before the fall or without "other indicia" of a potentially hazardous condition. *Id.*; see also *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010).

The open and obvious danger doctrine was most recently applied in the context of black ice in *Janson*, 486 Mich at 934. The Michigan Supreme Court in that case reversed the decision of this Court[1] which had found a condition of black ice was not open and obvious, and reinstated the trial court's grant of summary disposition. The facts in *Janson* were described by this Court:

> [W]eather records and testimony indicated that the temperature remained below freezing on the day of the incident, but the precipitation was light and had tapered off earlier that day. Plaintiff testified that the roads leading to defendant's funeral home were clear. Defendant's parking lot also appeared to be clear. Plaintiff testified that he had not encountered any other patches of ice in defendant's parking lot before his fall. Defendant's operator testified that he salted the parking lot and that the area where plaintiff fell seemed slippery even though he did not see any ice there. Merrow testified that there were patches of ice throughout the parking lot and that although he encountered them, he did not see any of them. We find nothing in the record to show that plaintiff saw anyone else slip on the parking lot surface, nor do we find any indication that there was any snow around the area where plaintiff fell. [*Janson v Sajewski Funeral Home, Inc*, 285 Mich App 396, 399-400; 775 NW2d 148 (2009).]

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[1] *Janson v Sajewski Funeral Home, Inc*, 285 Mich App 396; 775 NW2d 148 (2009).

The Supreme Court held that the Court of Appeals panel had failed to adhere to the governing precedent, as established in *Slaughter*, that black ice conditions are open and obvious where there are "indicia of a potentially hazardous condition," including the "specific weather conditions present at the time of the plaintiff's fall." *Janson*, 486 Mich at 935. The Court noted that the slip and fall occurred "in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening." *Id.* It concluded that the wintry conditions would have alerted a reasonable person of ordinary intelligence to discover the danger upon casual inspection. *Id.*, citing *Novotney*, 198 Mich App at 475.

In the instant case, plaintiff argues that the trial court erred in finding that there was no genuine issue of material fact regarding whether the black ice was open and obvious. First, it should be noted that the evidence presented does not entirely support plaintiff's assertion that the accumulated ice was "black ice," that is, invisible or nearly invisible ice. Both plaintiff and her supervisor admitted that the ice was clearly visible upon fairly close inspection. The photographic evidence, furthermore, clearly shows a darker area on the pavement in the spot where plaintiff fell. This difference in color, under the circumstances, implies the presence of ice.

Even assuming, however, as the trial court did, that the ice was "black ice," plaintiff argues that the trial court erred in considering several facts as "other indicia of a hazardous condition." First, plaintiff argues that the trial court erred in considering as "other indicia" the presence of ice and snow and recent heavy precipitation. Given the Supreme Court's decision in *Janson*, plaintiff's argument lacks merit. As emphasized in *Slaughter*, 281 Mich App at 483, "the circumstances and specific weather conditions present at the time of plaintiff's fall are relevant" in determining whether black ice can be open and obvious.

Plaintiff also argues that the trial court erred in considering her longtime Michigan residency and experience with Michigan weather as "other indicia." However, in *Kaseta v Binkowski*, 480 Mich 939; 741 NW2d 15 (2007), the Michigan Supreme Court reversed this Court's decision[2] affirming denial of summary disposition to the defendant, and it adopted this Court's dissenting opinion. The dissent had concluded that the existence of black ice was open and obvious where the plaintiff, "a lifelong Michigan resident" who had "considerable experience with [Michigan] weather," observed snow on a driveway following a day of sunshine and fluctuating temperatures, and knew that the temperature was dropping. Notably, in *Kaseta*, there was no evidence of visible ice or snow in the driveway where the plaintiff fell.

Finally, plaintiff disputes the propriety of the trial court's consideration of her previous slip and fall on ice years before as "other indicia" of a hazardous condition. While plaintiff is correct that the analysis of open and obvious conditions must focus on the objective nature of the condition of the premises at issue, and not the subjective degree of care used by the plaintiff,

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[2] *Kaseta v Binkowski*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2007 (Docket No. 273215).

Lugo, 464 Mich at 523-524, the standard nonetheless requires the court and the fact-finder to consider whether "a reasonable person *in the plaintiff's position*" would have foreseen the danger. *Slaughter*, 281 Mich App at 479. The trial court in this case considered plaintiff's previous fall in order to examine whether a person with her experience would have been on notice of the hazardous condition on casual inspection, and not in order to determine whether she actually took appropriate precautions as a result of her previous experience. This was not error.

The evidence presented in this case revealed that there was noticeable snow and ice in the vicinity of plaintiff's fall, both in neighbors' driveways and sidewalks, and along defendant's partially cleared driveway. There had been a significant accumulation of snow the day before plaintiff's fall. Photographic evidence depicted a darker area visible on the pavement at the point where plaintiff reported that she fell. Plaintiff admits that the ice was visible once she was on the ground, and her supervisor stated that the ice was obvious once it was pointed out to him. Furthermore, a longtime Michigan resident whose job requires her to be in the elements year-round, particularly one who has slipped and fallen on black ice in the past, would have realized that the path along the driveway was potentially icy. These facts, viewed most favorably to plaintiff, support the conclusion that the alleged black ice was open and obvious because there was sufficient indicia of a potential hazard to alert a reasonable person of ordinary intelligence that a dangerous condition existed. *Janson*, 486 Mich at 934; *Slaughter*, 281 Mich App at 483. Accordingly, summary disposition was proper.

Plaintiff next argues that, even if the black ice was open and obvious, summary disposition was still improper because the danger it posed was effectively unavoidable. Again, we disagree.

When a court finds that a condition is open and obvious, it must consider whether there are any "special aspects" that create an unreasonable risk of harm despite the condition being open and obvious. *Lugo*, 464 Mich at 517. The inquiry in such cases is "whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability." *Id*. at 517-518. To be a special aspect, the harm must be "effectively unavoidable," giving rise to a uniquely high likelihood of harm, or constitute "an unreasonably high risk of severe harm." *Id*. at 518.

Here, plaintiff argues that, even if the hazard posed by the black ice was open and obvious, the condition was effectively unavoidable because plaintiff had no choice but to traverse the hazardous driveway in order to deliver the defendant's mail.[3] In similar cases where hazards were found to be effectively unavoidable, however, there was no ice-free path for the plaintiff to walk. See, e.g., *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593-594; 708 NW2d 749 (2005). In this case, the evidence suggests that despite the visible ice present in places on the driveway, there was nothing preventing plaintiff from stepping around the icy spots or stepping off of the driveway onto the snow in order to avoid icy patches. While doing so may have been mildly inconvenient, public policy requires that people take reasonable care for their

[3] Plaintiff does not argue that the ice posed an unreasonably high risk of severe harm.

own safety. See *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 17-18; 643 NW2d 212 (2002).

Because there were ice-free alternative paths for plaintiff to traverse in order to deliver defendant's mail, the hazard posed by the patch of ice plaintiff ultimately slipped on was not "effectively unavoidable." Accordingly, the trial court did not err in finding no "special aspects" that would impose liability upon the defendant.

The dissent maintains that the hazard was effectively unavoidable because there was no safer alternative to the path taken by plaintiff where the plaintiff would have needed to walk on a shoveled strip of driveway or traverse snow-covered areas. We respectfully disagree. The pictures of the scene taken after the incident show tracks in the driveway that are clear of snow, which tracks appear to also have many dry areas free of ice. Regardless, plaintiff could have avoided the ice patch by walking on surrounding snow, and we cannot agree with the dissent that a patch of ice is effectively unavoidable if an alternative route involves traversing snow. Simply because snow presents an open and obvious danger giving rise to a need to watch one's footing and proceed with some care does not mean that walking upon it is not a safe and viable alternative such that traversing nearby ice is deemed unavoidable. As Michiganders, we have all treaded on snow during our lifetimes, absent incident for most of us, and there can be no reasonable dispute that ice presents a greater danger than simple snow. The question is whether walking on the ice patch was effectively unavoidable, and it was not. If plaintiff was completely surrounded by ice and was forced to walk on ice regardless of what direction was taken, plaintiff's argument might have some merit, but this was not the case.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter